

Appl. No. 09/895,027
Atty. Docket No. 8610
Amdt. dated Oct. 31, 2005
Reply to Office Action of June 29, 2005
Customer No. 27752

REMARKS

Claims 1-3 and 5-21 are pending in the present application. No additional claims fee is believed to be due.

Claim 1 has been amended to include the phrase "having a different composition from the first layer, wherein the first layer comprises at least about 5% , by weight of the substrate, of the beneficial component." Support for this amendment may be found on page 21, line 16 to page 22, line 21 and on page 8, lines 11-14.

Claim 5 has been amended to delete the phrase "wherein the beneficial component which comprises at least a first layer and a second layer."

Claim 9 has been amended to correct an issue with antecedent basis by inserting the term "component" in for "composition."

These changes do not involve introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

REJECTIONS UNDER 35 U.S.C. § 103

Claims 1-3 and 5-21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over International Publication No. WO 00/64502 to Krzysik et al. (hereafter "Krzysik"). The reasoning for the Office's rejection remains essentially unchanged from that presented in the Office Action mailed July 20, 2004. In the most recent Office Action mailed June 29, 2005, the Office has included responses to a Reply Brief submitted by Applicant on April 11, 2005. The responses by the Office will be addressed with the appropriate claim. Applicant traverses the rejection for the reasons presented below in regard to the presented claim.

Claim 1

1. The Office has failed to present factual support or a convincing line of reasoning in support of a reasonable expectation of success for the Office's proposed modification. The Office argues that since Krzysik teaches that the lotion can be applied at 0.05-100 mg/cm², "it would have been within the scope of a skilled artisan to optimize the amounts of lotion applied on the absorbent article" and that "[t]he expected result would be a minimum migration of the solidified components applied to the bodyside liner." *Office Action of July 20, 2004*. Case law clearly places the "burden of proof on the Patent Office which requires it to produce the factual basis for its rejection of an

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application under sections 102 and 103.” *In re Warner*, 379 F.2d 1011, 1016 (CCPA 1967). The Office asserts that optimizing the amount of lotion applied on an absorbent article will produce the expected result of minimum migration of the solidified components to the bodyside liner. The Office provides no factual basis for this “expected result.” The Office’s assertion is based on mere subjective expectation that is neither convincing nor supported in fact.

2. The reference relied upon by the Office fails to teach Appellant’s “ratio of the quantity of the beneficial component” limitation as recited in Claim 1. Applicant reasserts the argument presented in Section A.3. beginning on page 4 of the Appeal Brief dated December 20, 2004. To summarize the argument, the Office has failed to show how Krzysik teaches or suggests Appellant’s claim limitation directed to top biasing (“whereby the ratio of the quantity of the beneficial component present on or within the thickness between 0 and $Z/3$ of the substrate is at least about 2.2 times the quantity of the component within the thickness between $2Z/3$ and Z of the substrate until the time of the use of the article”) for the following reasons: (i) the Krzysik test cannot determine lotion concentration on or within discrete thicknesses of the liner, and (ii) the Krzysik test measures migratory loss of the lotion in directions other than the Z -direction. As a result of these findings, the Office has failed to meet its burden of providing a factual basis for the rejection; the Office has assumed more than what Krzysik test teaches.

3. The Office fails to provide a motivation for modifying Krzysik The Office states that “it would have been within the scope of a skilled artisan to optimize the amount of lotion applied on the absorbent . . . the expected result would be a minimum migration of the solidified component.” The Office has failed to provide a motivation for modifying Krzysik. Krzysik, as presented above, does not disclose top biasing. Krzysik discusses minimizing migration. However, it is important to highlight what migration means in Krzysik. Applicant submits a declaration from Mr. Olaf Isele under 37 C.F.R. § 1.132. The declaration explains the deficiency present in Krzysik and why one skilled in the art would not be led to Applicant’s top biasing. Namely, migration as taught in Krzysik is not equivalent to the top bias of the present application. As explained in the declaration, in Krzysik, migration refers only to a lotion that has left the substrate. In the present application, migration means transport of the beneficial component away from a

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point where it can be readily transferred to the target surface. As a result, the lotion bearing liner in Krzysik may exhibit no migration according to Krzysik's definition of migration. However, the same liner can fail Applicant's top biasing by not being readily transferable to the target surface (*i.e.*, lotion has penetrated into the substrate or liner and is no longer in or on the top third of the substrate or liner). Given that Krzysik teaches nothing resembling top biasing, Applicant asserts that the Office has failed to present sufficient motivation for modifying Krzysik so as to include top biasing.

4. The reference relied upon by the Office fails to teach Appellant's limitation of "wherein the beneficial component comprises at least a first layer and a second layer having a different composition from the first layer, wherein the first layer comprises at least about 5% , by weight of the substrate, of the beneficial component." Claim 1 as amended recites that the second layer is different from the first layer and the first layer comprises at least about 5%, by weight of the substrate, of the beneficial component. The Office has not pointed to any passage within Krzysik that teaches or suggests the recited limitation.

Claim 5 The Office has failed to provide support for its rejection of Claim 5 in the Office Action mailed June 29, 2005 . As a result, a *prima facie* case of obviousness has not been established. However, the Office does state:

With respect to claims 9 and 16, WO does not explicitly teach layers of beneficial component or disposing a first hydrophilic layer followed by a hydrophobic layer. . . . WO also teaches deposition of wax, emollients and other viscosity enhancers such as celluloses, silica, petrolatum, aloe etc., all of which read on instant hydrophilic components, along with emollients and was (hydrophobic) in the lotion formulation.

Even assuming that this reasoning is applicable to Claim 5, it fails to provide any motivation for why one skilled in the art who layer any of the mentioned components.

The Office has presented arguments regarding Claim 5 in a previous Office Action mailed July 20, 2004 (see page 5); however, those arguments were addressed in the Appeal Brief beginning on page 8.

Claim 8 The Office fails to establish a *prima facie* case of obviousness by failing to teach each and every limitation present in Claim 8. The Office fails to provide a

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reference teaching the article, as described in Claim 1, is a "buffs, bandages, mops, cloths, wipes, sponges, or other flexible dispensing means intended for use on inanimate objects."

Claims 9 and 16 The Office's argument has remained unchanged with regard to these Claims. Applicant has addressed these claims in the Appeal Brief beginning on page 9.

Claim 11 The Office fails to establish a *prima facie* case of obviousness by failing to teach each and every limitation present in Claim 11. The Office fails to provide a reference teaching a first layer that is relatively hydrophilic and a second layer that is relatively hydrophobic.

Claim 13 The Office fails to establish a *prima facie* case of obviousness by failing to teach each and every limitation present in Claim 13. The Office fails to provide a reference teaching an article comprising a third layer disposed on at least a portion of the second layer.

Claim 20 The Office fails to establish a *prima facie* case of obviousness by failing to teach each and every limitation present in Claim 20. The Office fails to provide a reference teaching a hydrophobic component that comprises a volatile intermediary.

Claim 21 The Office fails to establish a *prima facie* case of obviousness by failing to teach each and every limitation present in Claim 21. The Office fails to provide a reference teaching a first layer comprising a volatile base lotion such that the first layer dissipates subsequent to application of the second layer.

Conclusion

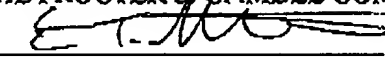
In light of the above remarks, it is requested that the Examiner reconsider and withdraw the rejection under 35 U.S.C. § 103(a). In view of the foregoing, reconsideration of this application, entry of the amendments presented herein, and allowance of Claims 1-3 and 5-21 is respectfully requested.

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Respectfully submitted,

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